IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4677 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HABIBEG CHHOTUMIYA MOGAL

Versus

COMMISSIONER OF POLICE

Appearance:

MR NM KAPADIA for Petitioner

Mr UA Trivedi, APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 09/12/96

ORAL JUDGEMENT

This Special Civil Application has been filed by the brother of the detenu - Mehoboobmiya alias Mehboob Senior Chhotumiya Mogal, who has been preventively detained by the impugned order dated 6.6.1996 passed by the Commissioner of Police, Ahmedabad in exercise of powers under sub-section (1) of section 3 of Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as 'Act of 1985'). It appears

from the grounds of detention that two cases have been registered against the petitioner. First case is registered as CR No.111/94 of DCB, Ahmedabad City. In that case, the detenu was arrested on 12.4.1996 on the allegation that he was involved in transporting certain arms and ammunitions to accused persons like Gujukhan Pathan and Sathar Battery who are involved in CR No.11/94. It was also alleged that the detenu had given a car to another accused Sher Khan and the said Sher Khan had run away from Ahmedabad with the car. The second case has been registered as CR No.310/96 registered at Kalupur Police Station. It is alleged in that case that the detenu was found in possession of fire arms without licence from the disturbed area.

2. It is contended by Mr N M Kapadia, learned Advocate for the petitioner that simply because on the basis of two cases registered against the petitioner, the detenu cannot be branded as 'dangeroaus person'. He further submits that so far as the first case is concerned, the detenu has been enlarged on bail by the order of the Additional designated Judge, Court No.6, on 24.5.1996 on the following conditions:

(1) Applicant shall not leave Head Quarters without prior permission of the Court,

(2) The applicant shall surrender his passport to the said Court if any, within 15 days from the date of order,

(3) The applicant shall not tamper prosecution witnesses,

(4) If the applicant fails to observe the conditions the security deposit of Rs.25,000/- will be forfeited and non-bailable warrant will be issued against him.

The learned Advocate further submits that the State approached the Apex Court by way of Special Leave Appeal (Criminal) for cancellation of the order granting bail. The Apex Court, by order dated 1.11.1996 in Special Leave Appeal (Criminal) No.3277/96, rejected the same.

3. So far as the second case is concerned, Addl. Sessions Judge, Ahmedabad, by order dated 6.6.1996 has granted bail on the condition that the accused detenu shall mark his presence at Kalupur police station on every date of every month between 10 am and 4 p.m. till chargesheet is submitted against him and further that he

shall not leave the local limits of Gujarat without prior permission of the Court.

4. It is further contended by Mr Kapadia, learned Advocate for the petitioner that the detaining authority has not considered the grounds of bail application in case No.310/96 and further the fact that the detenue was granted bail on the same date i.e. on 6.6.1996. Learned Advocate placed reliance on a decision of the Apex Court in the case of Ahmed Kutty vs. Union of India & Ors., reported in 1990 (2) SCC 1. On the other hand, Mr U A Trivedi, learned APP submits that as the bail application has not been referred by the detaining authority, it cannot be said to be a document of vital importance and as such it was not necessary to supply the same. He further submits that the fact of releasing the detenu on bail could not be considered by the detaining authority as at the time when the matter was considered, the detenu was in custody. He placed reliance on a decision of the Apex Court in the case of Abdul Sathar Ibrahim Manik v. Union of India & Ors., reported in Air 1991 SC 2261. The Apex Court, after considering various decisions in Abdul Sarthar's case (supra), has laid down principles with respect to supply of documents for consideration of grounds raised on violation of Article 22(5) of the Constitution of India as under:

"(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.

(3) If the detenu has moved for bail then the

application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction eing impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts iand the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

The principles laid down in para 6 of the above decision is the relevant guiding factor in the present case. It is provided therein that in case the detenu was released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital

ground for ordering detention. In the present case, there is a peculiar situation, inasmuch as that the order of detention and the order of release is of the same date i.e. 6.6.1996. It is submitted by the learned APP that the sponsoring authority has submittted the matter before the detaining authority on 3.6.1996. It is not in dispute that the apaplication was filed before the learned Sessions Judge on 3.6.1996. In view of this the sponsoring authority was aware of the matter that the bail application was pending before the competent court. In view of this the detaining authority ought to have considered that one of the grounds for detention which was pending before him for consideration was also pending consideration for bail before the competent court. In view of this he could have enquired with respect to bail application from the concerned authorities and could have waited for some time till the decision of the bail application. In this context, the bail application dated 3.6.1996 ought to have been placed before the detaining authority and the copy should also have been supplied to the detenu. Thus, on the facts of the case, non-consideration of the application for bail and the order releasing the detenu on bail would be violative of Article 22 (5) and the continued detention would be illegal.

5. In view of the aforesaid, this Special Civil Application is allowed. The order of detention dated 6.6.1996 is quashed and set aside. The detenu shall be released forthwith, if not required in any other case. Rule made absolute accordingly.

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